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Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY *et al.*,
Petitioners,

v.

COUNTY OF SANTA CLARA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A group of California counties and cities retained outside plaintiffs' law firms on a contingency fee basis to prosecute this public nuisance suit against companies that made or sold lead paint pigments more than thirty years ago. The civil prosecution is brought "in the name of the People of the State of California" and seeks abatement of lead paint from hundreds of thousands of public and private buildings in California at a potential cost of billions of dollars. Under the contingency fee retainer agreements upheld by the California Supreme Court, the government entities agreed to pay the plaintiffs' lawyers 17 percent of any recovery if they win the case, but nothing if they lose.

The question presented is whether contingency fee prosecutors' direct, personal, and substantial pecuniary interest in the outcome of a civil government prosecution seeking to vindicate sovereign interests violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b), the parties to the proceeding in the Supreme Court of California were:

Defendants Atlantic Richfield Company, American Cyanamid Company, ConAgra Grocery Products Company, E.I. du Pont de Nemours and Company, NL Industries, Inc., Sherwin-Williams Company, and Millennium Holdings LLC; and

Plaintiffs County of Santa Clara, County of San Mateo, County of Monterey, County of Solano, County of Los Angeles, County of Alameda, City and County of San Francisco, City of Oakland, City of Los Angeles, and City of San Diego.

Pursuant to Rule 12.6, petitioners state their belief that Millennium Holdings LLC has no interest in the outcome of the petition. Petitioners have served this notice to counsel for Millennium Holdings LLC.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners state as follows:

Petitioner Atlantic Richfield is a wholly owned subsidiary of BP America, Inc., which is a wholly owned subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a wholly owned subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield Company nor any of its direct or indirect parent companies other than BP p.l.c. is publicly held.

Petitioner American Cyanamid Company, now known as Wyeth Holdings Corporation, is a wholly-owned subsidiary of Wyeth LLC. Wyeth LLC is a wholly-owned subsidiary of Pfizer Inc. and the shares of Pfizer Inc. are publicly traded.

Petitioner ConAgra Grocery Products Company is a wholly owned subsidiary of ConAgra Foods, Inc. No publicly owned corporation owns more than 10% of ConAgra Grocery Products Company or ConAgra Foods, Inc.

Petitioner E.I. du Pont de Nemours and Company has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner NL Industries, Inc. is a publicly traded corporation that is not a wholly owned subsidiary of any parent corporation. Valhi, Inc., is a publicly-traded company that owns more than 10% of NL Industries, Inc.'s common stock.

Petitioner Sherwin-Williams Company has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 235 P.3d 21. Pet. App. 1a. The opinion of the California Court of Appeal is reported at 74 Cal. Rptr. 3d 842. Pet. App. 44a. The decision of the trial court is available at 2007 WL 1093706. Pet. App. 84a.

JURISDICTION

The Supreme Court of California entered judgment on July 26, 2010. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

INTRODUCTION

"If I don't bring the lead paint industry to its knees in three years, I will give them my boat." So said one of the plaintiffs' lawyers in this case, Ronald L. Motley, in 1999 to the Dallas Morning News. As later reported, the Motley law firm began its campaign against the industry by persuading the Rhode Island attorney general's office to hire the law firm to bring a public nuisance action, with the agreement that the firm would get 16.7 percent of any proceeds it recovered. Joe Nocera, *The Pursuit of Justice or Money?*, N.Y. Times, Dec. 8, 2007, at C1. The Motley firm and other prominent plaintiffs' lawyers then "raced all over the country, trying to get other jurisdictions interested in suing the same defendants on the same grounds." *Id.* And so began the present case.

In this case and others like it across the nation, plaintiffs' lawyers offered the same deal: a prepackaged, plaintiff-lawyer-concocted lawsuit that they would fund at "no cost" to the government in exchange for a direct and substantial financial stake in the putatively government-brought litigation. Here, some of the largest counties and cities in California agreed to give the Motley law firm and other plaintiffs' lawyers 17 percent of the potentially billions of dollars sought in this public nuisance

action brought "on behalf of the People of the State of California." C.A. App. 87.

Since the 1980s, California courts—relying on this Court's due process jurisprudence—had found such arrangements categorically barred as antithetical to fair process and a threat to the public's confidence in the integrity of the judicial system. Meanwhile, in other jurisdictions, such arrangements flourished, as contingency fee lawyers brought suits on behalf of state and local governments seeking to vindicate sovereign interests against the lead pigment, pharmaceutical, poultry, and gun industries, among others. Today, these contingency fee arrangements are the subject of a national controversy and have been condemned by the Executive Branch, Congress, former state attorneys general, public prosecutors, and academics.

Nevertheless, the California Supreme Court's decision gives a green light to the government's use of contingency fee prosecutors, so long as the plaintiffs' firms recite in their retainer agreements that government staff lawyers "control" the litigation. Pet. App. 27a-39a.

Adding boilerplate language does not change the fact that these contingency fee arrangements create "a conflict of interest that potentially places [lawyers'] personal interests at odds with the interests of the public" whom they purport to represent. *Id.* at 26a. Nor does such language remove the gross appearance of impropriety when the government delegates its sovereign police powers to plaintiffs' lawyers in exchange for a bounty based on the amount of money they can extract from the defendants. This Court should grant review to resolve a question that is central to the integrity of the judicial

process and exceptionally important as this brand of lawyer-sponsored government litigation becomes a cottage industry.

STATEMENT

I. The Government Public Nuisance Prosecution

1. *The Complaints.* In late 1999 or early 2000, the County Counsel for Santa Clara County "read about the Rhode Island lead paint case and thought Santa Clara might have similar claims against the lead industry." C.A. App. 428. Soon thereafter, in February 2000, the County's board approved filing this lawsuit and hiring the Cotchett, Pitre and McCarty firm to represent the County. *Id.* at 429.

In the retainer agreement, the County agreed to pay the Cotchett firm 17 percent of any recovery if the lawyers prevailed. *Id.* at 243. But if they lost, the County would pay no costs other than $150,000 seed money it provided to get the suit started. *Id.* The retainer agreement also provided, until recently, *see id.* at 429, that the County would cede control of the litigation to its contingency fee lawyers:

> Cotchett is given absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present.

Id. at 246.

In March 2000, the Cotchett firm filed a putative class action against eight companies that lawfully made and sold lead paint pigments many decades ago, alleging that the companies had "misrepresented and concealed the health hazards connected with lead paint." C.A. Supp. App. 827 ¶ 1. The County asserted claims for strict product liability, negligence,

fraud, indemnity, unfair business practices, and unjust enrichment. *Id.* at 850-58. The complaint sought compensatory and punitive damages, disgorgement of profits, attorneys' fees, and other relief. *Id.* at 858-59.

Within a few months, other government entities joined the suit. The first amended complaint, filed in September 2000, added as plaintiffs Santa Cruz, Solano, and Alameda Counties. 1st Am. Compl. ¶¶ 7-9. Each of these government entities agreed to pay the Cotchett firm 17 percent of any recovery if the lawyers won, but nothing if they lost. Their retainer agreements also gave the contingency fee prosecutors "absolute discretion" over the litigation. C.A. App. 276, 285, 304.

Over the next year, additional governments signed on to the lawsuit. The second and third amended complaints brought new claims for public and private nuisance and added as plaintiffs the City of Oakland and three local agencies; the County of Kern; and the Santa Clara County District Attorney. 2d Am. Compl. ¶¶ 10-13, 163-80; 3d Am. Compl. Caption, ¶¶ 2, 8-15. Several of the entities executed retainer agreements giving the Cotchett firm 17 percent of any recovery and "absolute discretion" over the litigation. C.A. App. 291, 297.

The City and County of San Francisco also joined the suit, but they were represented by Motley Rice LLP and additional outside counsel. At that time, Motley Rice "actively represented" Rhode Island in its public nuisance action against petitioners. *Id.* at 483. Motley Rice also represented "26 cities and counties in New Jersey and six cities in Ohio, each of which have filed public nuisance actions against these same defendants." *Id.* San Francisco's retainer

agreements appointed Motley Rice and its co-counsel as "Special Assistant City Attorneys," gave them 17 percent of any recovery, and agreed that the outside lawyers would pay all litigation costs. *Id.* at 230, 232. These agreements also stated that San Francisco retained authority over the litigation. *Id.* at 230.

The trial court dismissed the public nuisance claim on the ground that products liability claims in the guise of public nuisance are not cognizable. The court also granted petitioners summary judgment on the private tort claims as time-barred. *See* Pet. App. 3a. The government entities appealed, and the California Court of Appeal reversed. *See id.*; *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 348 (Cal. Ct. App. 2006). The court reinstated the governments' public nuisance claim as well as their fraud, negligence, and strict liability causes of action. *Santa Clara*, 40 Cal. Rptr. 3d at 348. The court found that the public nuisance claim was "not a disguised version of plaintiffs' products liability causes of action" because the government entities were "*not* seeking *damages* for injury to *their* property or the cost of remediating *their* property." *Id.* at 328-29 (emphasis in original). Rather, "the representative cause of action is a public nuisance action brought *on behalf of the People seeking abatement*" of lead paint from properties throughout California. *Id.* at 328 (emphasis in original).

Although the appellate court reinstated many of the private tort claims, the governments' fourth amended complaint asserted public nuisance as the sole claim and sought abatement as the sole remedy. Pet. App. 3a.; C.A. App. 108-10, 821-22. The fourth amended complaint dropped several government

entities but added Monterey and San Mateo Counties, and the City of San Diego. The retainer agreements with these new plaintiffs provided for a 17 percent contingency fee with outside counsel covering all litigation costs. As for control of the case, one agreement gave the Cotchett firm "absolute discretion," C.A. App. 314, while others stated that government lawyers retained "final authority." *Id.* at 335; *see also id.* at 455. The fourth amended complaint also added the City of Los Angeles and the County of Los Angeles, which are not represented by outside counsel. Pet. App. at 3a n.1; C.A. App. 475.

2. *The Proceedings to Bar Contingency Fees.* After the government entities limited their case to a public nuisance prosecution, the companies moved to bar the governments from paying their lawyers a contingency fee based on the outcome of the case. C.A. App. 119-38. The companies did not dispute that the government entities could retain the contingency fee lawyers to assert *proprietary* claims. *See, e.g., id.* at 727. But the governments now asserted purely sovereign claims and the lawyers performed a *prosecutorial* role in pursuing a quasi-criminal public nuisance action. The companies thus asserted that giving the contingency fee prosecutors a direct, personal, and substantial financial stake in the success of the case was contrary to *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), and the federal due process principles embodied therein.

In response, the governments submitted declarations stating that, notwithstanding any agreements to the contrary, they had retained control of the litigation. Pet. App. 5a. Some of the entities that had given "absolute discretion" to the contingency fee

prosecutors "disclaimed" their retainer agreements and asserted that they had amended or would amend the agreements. *Id.*; *see also* C.A. App. 405-86. The governments further stated that they lacked the financial resources, staff, and expertise to pursue their claim absent contingency fee agreements with the plaintiffs' firms, notwithstanding that the combined entities have multi-billion dollar annual budgets and large legal departments staffed with hundreds of government lawyers. Pet'rs' Cal. Ct. App. Br. at 50-51 nn. 14-15 (July 30, 2007).

II. State Court Decisions Below

In April 2007, the trial court granted the companies' motion to preclude the governments' payment of contingency fees. Pet. App. 88a-89a. The trial court held that such contingency fee arrangements are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 86a (quoting *Clancy*, 705 P.3d at 353). The court also found that "[o]versight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality." *Id.* at 87a. "Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee," the arrangement was improper. *Id.*

The California Court of Appeal vacated the trial court's order, holding that public entities may "engag[e] private counsel under a contingent fee arrangement . . . so long as the public entities' in-house counsel retain control over all decision-making." *Id.* at 63a.

The California Supreme Court upheld the contingency fee arrangements on the condition that the retainer agreements recite that government lawyers have control over the lawyers who stand to benefit financially from the prosecution. *Id.* at 38a. The court acknowledged that the contingency fee prosecutors "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." *Id.* at 26a.

The court further recognized that its prior decision in *Clancy*, which relied on this Court's due process decisions, "arguably supports defendants' position favoring a bright-line rule barring any attorney with a financial interest in the outcome of a case from representing the interests of the public in a public-nuisance abatement action." *Id.* at 2a. The court nonetheless found that a contingency fee prosecution here would not deprive the defendants of their constitutional right to fundamentally fair procedures.

First, the court observed that "due process would not allow for a criminal prosecutor to employ private co-counsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution." *Id.* at 15a n.7. But the court found that such a liberty interest is not implicated where, as here, "the statute of limitations on any criminal prosecution has run and there is neither a threat nor a possibility of criminal liability being imposed upon defendants." *Id.* at 22a.

Second, the court held that the need for a disinterested prosecutor in this case is lowered because petitioners are "large corporations with access to abundant monetary and legal resources." *Id.* at 23a. Thus, any concern "about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case." *Id.* at 24a. The need for a disinterested prosecutor also is lowered, the court reasoned, because this case does not involve "any First Amendment right or any other liberty interest" and "will not result in an injunction that prevents the defendants from continuing their current business operations." *Id.* at 22a.

Third, the court reasoned that "control of the litigation by neutral attorneys provides a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary award." *Id.* at 33a-34a. The court sought to implement this supposed safeguard by setting forth several specific provisions that must be included in the contingency fee retainer agreements. *Id.* at 37a. The court reversed and remanded so that the government entities and the contingency fee prosecutors could revise their retainer agreements to include the provisions for control outlined by the court. *Id.* at 39a.

REASONS FOR GRANTING THE WRIT

Due process demands that before a State deprives a person of property, the judicial procedures leading to that deprivation must be fundamentally fair. In the decision below, however, the California Supreme Court held that contingency fee lawyers could prosecute this public nuisance action seeking to impose billions of dollars in abatement costs on petitioners. In other words, the more liability the prosecutors

seek to impose in this public prosecution, the more they stand to receive as a bounty at the end of the case.

The court below reached that remarkable result on the theory that contingency fee arrangements can provide for disinterested government lawyers to retain ultimate control over the litigation. That analysis does not withstand scrutiny. Under the Due Process Clause, a public prosecutor could not be paid a bounty for prosecuting a civil or criminal case as long as his supervisor was paid on a salary basis. Nor could a private attorney receive a contingency fee for prosecuting a criminal case as long as a government attorney had ultimate decision-making power in the case. There is no principled reason for a different outcome here. And even assuming the fiction that government control could neutralize the contingency fee prosecutors' structural conflict of interest, the arrangement creates an untenable appearance of impropriety that diminishes faith in the fairness of our civil justice system.

I. A PUBLIC NUISANCE ACTION PROSECUTED BY CONTINGENCY FEE LAWYERS VIOLATES DUE PROCESS

A. Due Process Bars A Prosecutor From Having A Substantial Financial Stake In A Case

This Court has long held that due process forbids any arrangement whereby an extraneous influence could compromise a government actor's ability faithfully to discharge his or her duties in the judicial system. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523-24 (1927). Thus, the Court has struck down schemes where a pecuniary or other improper interest could

undermine a judge's impartiality, *see id.*, or might distort a criminal or civil prosecutor's duty to put justice over personal interests. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality opinion); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). The prohibition against such structural conflicts of interest "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citations and internal quotation marks omitted). The contingency fee arrangements here blatantly violate both the "appearance and reality," *id.*, of fairness required by this Court's jurisprudence.

1. In the context of judges, this Court long has recognized the "controlling principle" that any "'procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2260 (2009) (quoting *Tumey*, 273 U.S. at 532). In the path-marking *Tumey* decision, the Court reversed convictions rendered by a village mayor whose neutrality was jeopardized because he was paid a portion of the criminal fines he imposed as a judge, whereas he received no compensation for judgments of acquittal, 273 U.S. at 520, and because other sums from the fines were deposited into the village's treasury for improvements and repairs. *Id.* at 521.

The Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a

criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. The mayor was thus disqualified from judging cases "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535. The Court rejected the contention that the judge received only a modest sum of $12 from the fine, declining to "regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling, or insignificant interest." *Id.* at 532.

Similarly, in *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 59 (1972), this Court invalidated a procedure whereby funds produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not paid from those sums. The Court reasoned that the "possible temptation" forbidden by due process was present "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60. The Court distinguished situations where the extraneous influence was "too remote to warrant a presumption of bias toward conviction in prosecutions before [the] judge." *Id.* at 61; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (due process barred a state high court judge from participating in a civil case nearly identical to the judge's own lawsuit); *Marshall*, 446 U.S. at 243 n.2 (collecting cases); *cf. Caperton*, 129 S. Ct. at 2265 (due process barred a state high court judge from participating in a suit against a company run by the judge's largest campaign contributor).

2. In the context of prosecutors, this Court likewise has held that an arrangement that would put a prosecutor's personal interest ahead of his public duty to seek justice is fundamentally unfair. While prosecutors need not have the same degree of impartiality as judges, *see Marshall*, 446 U.S. at 248, prosecutors serve a unique function in the judicial process as "both an administrator of justice and an advocate." *United States v. Young*, 470 U.S. 1, 9 n.6 (1985) (citation and internal quotation marks omitted). A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *United States v. Berger*, 295 U.S. 78, 88 (1935). As such, a prosecutor's interest is not that the government "shall win a case, but that justice shall be done." *Id.*; *see also Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963) ("[T]he government wins its point when justice is done in its courts." (internal quotation marks omitted)).[1]

It is antithetical to our system of justice to permit a criminal or civil prosecutor to have a personal stake in a public prosecution that might prevent the proper exercise of the prosecutor's official duty to seek justice and to further the public interest. In *Young*, for instance, the Court "establish[ed] a categorical rule against the appointment of an interested prose-

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[1] *See also, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (describing "the special role played by the American prosecutor in the search for truth in criminal trials"); *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979) ("The responsibility of the prosecutor as a representative of the public . . . requires him to be sensitive to the due process rights of a defendant to a fair trial.").

cutor" to pursue a criminal contempt action on behalf of the government. 481 U.S. at 814. There, the defendant in a civil case was charged with criminal contempt, and the judge appointed the plaintiff's private lawyer as a special prosecutor to pursue the charge. *Id.* at 790-92. Finding the appointment improper, the Court stated that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States" and are "appointed solely to pursue the public interest in vindication of the court's authority." *Id.* at 804. Thus, they "should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* Because the private lawyer "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client," the arrangement was improper. *Id.* at 805.

Similarly, this Court in *Marshall*, which involved a civil enforcement action, held that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." 446 U.S. at 249-50. The Court observed that civil prosecutors, while they do not have the identical duties of judges, nonetheless "are also public officials; they too must serve the public interest." *Id.* at 249 (citing *Berger*, 295 U.S. at 88). Accordingly, due process imposes "limits on the partisanship of [such] prosecutors." *Id.*

The California Supreme Court glossed over these due process principles and the inherent risks of allowing a prosecutor to have a financial stake in the case.

B. A Contingency Fee Arrangement Interferes With A Prosecutor's Duty To Act Solely In The Public Interest

1. This case is a paradigmatic example of the type of government prosecution that the Court's due process jurisprudence forbids. Plaintiffs' lawyers brought and are pursuing this action in furtherance of purely private ends—because they "calculated" that "the possible reward" outweighed "the financial risk." Pet. App. 31a n.13. It violates due process for that type of personal financial calculation to fuel a public nuisance action brought in the government's sovereign capacity and imbued with important public health issues.

Contingency fee prosecutors have incentives that, under any "realistic appraisal of psychological tendencies and human weaknesses," *Marshall*, 446 U.S. at 252 (citation omitted), create a structural conflict between the pursuit of justice, which is the obligation of all prosecutors, and their personal interest in obtaining a substantial financial recovery. Under the contingency fee agreements, the prosecuting attorneys are entitled to 17 percent of any recovery if they win, but nothing if they lose. This arrangement inherently skews their decision-making and smacks of impropriety and thus denies fundamental fairness at every stage of the governments' civil prosecution.

For example, this Court has recognized that a private lawyer appointed as a prosecutor "may be tempted to bring a tenuously supported prosecution if such a course promises [personal] financial . . . rewards." *Young*, 481 U.S. at 805. The lawyers who developed the public nuisance theory underlying this case reportedly described it as a "Wacky Idea," but

one that could be exceptionally profitable. *See* Brian C. Jones, *How the Lead Paint Case Was Won*, Boston Phoenix, Feb. 28, 2007. The results thus far bear out the tenuous nature of this prosecution: courts across the country have rejected public nuisance claims like the one here.[2]

Financial incentives to prosecute also may prompt government entities to bring prosecutions they would otherwise have no desire or incentive to pursue because existing legislative and regulatory remedies already adequately address the alleged public nuisance. A wide swath of federal and state laws have for decades addressed the hazards of lead paint, including providing funding and grants to state and local governments for remediation. These programs are regarded as a public health "success story." *See, e.g.*, Richard O. Faulk & John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel, Part 1 of 3*, 21 Toxics L. Rep. 1071, at 9 (Nov. 30, 2006); *accord id. Part 2 of 3*, 21 Toxics L. Rep. 1124, at 8-29 (Dec. 7, 2006) (detailing the pervasive regulation of lead and the success of regulatory efforts).

In the face of this public health triumph, this case would never have been brought were it not manufactured, sold, and funded by contingency fee lawyers solely for private gain. The governments in this case have multi-billion dollar budgets and large legal

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[2] *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008) (rejecting public nuisance claim as a matter of law); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007) (same); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (same); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005) (same), *petition for leave to appeal denied*, 833 N.E.2d 1 (Ill. 2005).

staffs. *See supra* at 8. They did not, however, wish to expend public resources on this public action but rather opted for a no-risk, no-cost prosecution that could inflict billions of dollars of liability on an industry.

Beyond the threshold bias to invoke the government's police powers, a prosecutor's personal financial stake in a case improperly influences the myriad of strategic and tactical decisions made during the course of a longstanding prosecution. For instance, lawyers working on a contingency fee have powerful financial incentives to name as defendants large companies—as they have done here—because smaller companies would contribute less to any fees. *See Marshall*, 446 U.S. at 250 n.12 (due process considerations are heightened if "the alleged biasing influence contributed to prosecutions against particular persons"). Thus, the County Counsel for Santa Clara, which filed the initial complaint in this action, left the identification of all defendants to contingency fee lawyers. C.A. App. 429.

The inherent conflict of interest posed by contingency fee agreements infects other purely sovereign decisions. Contingency fee prosecutors have the incentive to seek monetary relief even if the public interest may be "better served by foregoing monetary claims, or some fraction of them, in return for non-monetary concessions." David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 323 (2001). Here, the contingency fee prosecutors initially focused for years on private tort claims seeking compensatory and punitive damages before abandoning those claims to

pursue a "common fund" for public nuisance abatement. C.A. App. 111, 850-59.

Similarly, contingency fee agreements incentivize prosecutors to seek relief that may actually be contrary to the public interest. The government entities in this case seek the extreme remedy of abating lead paint in all buildings everywhere, even though removal of intact paint may actually *increase* the risk of elevated blood lead levels in children and is in conflict with federal and state regulatory regimes. *See* Ctrs. for Disease Control & Prevention, *Managing Elevated Blood Lead Levels Among Young Children: Recommendations from the Advisory Committee on Childhood Lead Poisoning Prevention* 21 (Mar. 2002); California Childhood Lead Poisoning Prevention Act of 1991, Cal. Health & Safety Code §§ 105275-105310 & 17920.10 (making lead hazards illegal, setting forth procedures for state, county, or municipal agencies to remediate lead hazards, and providing funding for enforcement).

And contingency fee agreements inevitably affect the decision whether to continue a prosecution. The interests of the public may warrant dropping a prosecution where, as here, the underlying theory has been discredited and there are vast regulatory remedies and funding available to address the alleged nuisance. "But it is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work." Dana, *supra*, at 326.

C. The Government's Nominal Control Over Contingency Fee Counsel Does Not Cure The Taint Of Financially Interested Civil Prosecutors

The California Supreme Court acknowledged that the prosecutors' contingency fee arrangements create "a conflict of interest that potentially places [their] personal interest at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." Pet. App. 26a. The California Supreme Court nonetheless held that such arrangements were fair if they recite that government staff counsel retain ultimate control over all "critical discretionary decisions," such as the decision to settle the case, and that the supervising government counsel personally "oversee[] the litigation." *Id.* at 27a, 37a. That analysis does not withstand scrutiny.

A disinterested lawyer's control over a conflicted prosecutor does not alter the *structural* nature of the due process violation: a conflicted lawyer is prosecuting a case on behalf of a sovereign. The government could not pay a government staff prosecutor a substantial contingency fee for prosecuting a civil or criminal case so long as his government supervisor was paid on a salary basis. Nor could the government pay a contingency fee to a private lawyer appointed as a special criminal prosecutor so long as a government attorney had ultimate decision-making power in the case. There is no meaningful distinction between those examples and this case. In all instances, the conflict infects how the financially interested prosecutor thinks, acts, and makes recom

mendations to his client. And in all instances, the conflict creates an appearance of impropriety that undermines the public's confidence in the judicial process.

1. The California Supreme Court's reliance on nominal control by government counsel ignores a conflicted lawyer's pervasive influence over the course of a prosecution. The court fundamentally mischaracterized the contingency fee prosecutors as performing a "subsidiary" or "subordinate" role. *Id.* at 27a, 28a, 32a. The contingency fee prosecutors are the skilled architects, developers, and journeymen of this massive litigation. It is fanciful to pretend that they could function as puppets controlled by counsel who hired them given that they lacked the "necessary" expertise and resources to prosecute the case by themselves. *See* C.A. App. 411, 453, 459; *see also id.* at 407, 427, 448, 453, 456, 475.

The court did not, and as a practical matter could not, bar the conflicted contingency fee prosecutors from advising the salaried supervising prosecutors in making uniquely sovereign decisions about the litigation. As the trial court that presided over these lawyers for several years recognized, the contingency fee prosecutors "are not just a mouth piece [or] a potted plant"; those prosecutors are "providing [the] litigation in the courtroom[,] presenting [and] gathering the evidence . . . [and] all the work that you would do in any case." *Id.* at 812, 814. The California Supreme Court's theory of government control is illusory.

This Court in *Young*, moreover, held that attempting to ascertain any improper effects of an interested prosecutor is a fruitless enterprise:

> Appointment of an interested prosecutor is . . . an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

481 U.S. at 812-13 (emphasis in original); *see also id.* at 807 (a prosecutor's "decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court"); *cf. United States v. Gonzalez-Lopez*, 548 U.S. 140, 150-51 (2006) (recognizing it would be virtually "impossible" to detect what subtle differences result from a particular lawyer's involvement in a case).

The decision below is premised on the inherently futile exercise of trying to determine the indeterminable, *i.e.*, the effect of the structural conflict on the lawyer's actions in the proceeding. Indeed, the trial court below recognized the perils of trying to determine "whether the government attorneys have been exercising . . . control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel." Pet. App. 80a.

Even if it were possible to ferret out the bounds of "control," the attorney-client privilege presents significant obstacles. Petitioners sought discovery regarding the government lawyers' control, but the government entities withheld such information as privileged. Pet. App. 35a n.15; C.A. App. 384-85.

Boilerplate language reciting control by government attorneys does not cure an otherwise improper and fundamentally unfair procedure. In *Ward*, this Court rejected the argument that procedures allowing a financially interested judge to decide cases could be remedied by the "procedural safeguard" of a *de novo* trial or an appeal. 409 U.S. at 61. The Court held that due process requires an impartial adjudication "in the first instance." *Id.* at 62. Fair procedures in the first instance mean a prosecution staff consisting entirely of lawyers without a substantial financial stake in the outcome of a public proceeding.

2. Even indulging in the fiction that government control could neutralize the contingency fee prosecutors' structural conflict of interest, the "appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system." *Young*, 481 U.S. at 811. Thus, in *Young,* the Court found it irrelevant whether such an appointment caused actual harm, for "what is at stake is the public perception of the integrity of our criminal justice system." *Id.*; *accord id.* at 813 ("Public confidence in the disinterested conduct of [a prosecutor] is essential.").

Contingency fee prosecutors threaten to diminish the public's faith in the fairness of civil government prosecutions. These arrangements frequently result in allegations that government officials are doling out contingency fee agreements to lawyers who make substantial campaign contributions. *See* Editorial, *The State Lawsuit Racket: A Case Study in the Politician-Trial Lawyer Partnership*, Wall St. J., Apr. 8, 2009, at A12 (reporting that named partner of a firm pursuing a contingency fee contract with Pennsylvania made substantial campaign contributions);

Editorial, *The Pay-to-Sue Business: Write a Check, Get a No-bid Contract to Litigate for the State*, Wall. St. J., Apr. 16, 2009, at A14 (same for Mississippi, New Mexico, Louisiana, and Arkansas government officials who awarded contingency fee contracts). Similarly, there is a "growing perception that the contingency agreements are simply a way for state attorneys general to reward their political backers." John Beisner et al., *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, Institute for Legal Reform, at 7 (2005).

The public also perceives the contingency fee agreements as giving lawyers an undue windfall at taxpayers' expense. *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (reporting controversy over government agreement to give contingency fee lawyers half of any recovery in public environmental suit against poultry companies). As Judge William H. Pryor of the Eleventh Circuit Court of Appeals, then Attorney General of Alabama, aptly explained:

> The use of contingency-fee contracts allows government lawyers to avoid the appropriation process; it creates the illusion that the lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder, May 18, 2001, at 4. One need only search 'government contingency fee' on the Internet to grasp the public outrage over these arrangements.

3. The lower court's remand directing the government entities to modify their contingency fee agreements to include control provisions does not justify delaying this Court's review or render the judgment not final. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). As discussed, control is illusory, impractical, and unascertainable, and does not remove a seriously conflicted contingency fee prosecutor from the prosecution team. As such, proceedings on remand will not sharpen the issues for this Court's consideration.

Likewise, there is no need on remand to attempt to delve into the nature and extent of the harm to petitioners. *See Gonzalez-Lopez*, 548 U.S. at 149 n.4 (harmless error analysis is inapplicable to assess the effect on a case by an attorney's representation); *Young*, 481 U.S. at 813 (harmless error review is inapplicable when prosecutor is tainted by a conflict of interest). The federal issue has been finally decided and the federal constitutional question is squarely presented at this juncture. *Cox Broad. Corp.*, 420 U.S. at 480-82. There is accordingly no basis for permitting the case to continue violating the companies' due process rights and undermining the public's confidence in our civil justice system.

D. The California Supreme Court's Reasoning Aggravates The Due Process Violation

The court below also relied on a number of factors in this case that, in the court's view, minimized the due process interests at stake and justified permitting financially interested lawyers to prosecute this case. The court's reasoning is either without merit or exacerbates the denial of due process.

1. While recognizing that "due process would not allow for a criminal prosecutor to employ private [contingency fee] co-counsel," Pet. App. 15a n.7, the court found it significant that "there is neither a threat nor a possibility of criminal liability being imposed upon defendants." *Id.* at 22a. But there is no less need for a disinterested prosecutor simply because a procedural barrier exists to pursuing criminal remedies in an action brought on behalf of "the People." C.A. App. 88; Cal. Civ. Proc. Code § 731.

This Court has recognized that public nuisance is "akin to a criminal prosecution." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *see also Tull v. United States*, 481 U.S. 412, 421 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). In any event, the salient factor is that a public nuisance action is brought on behalf of the sovereign. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 604-05 (Cal. 1997) (tracing history of uniquely sovereign nature of California's public nuisance action).

Contingency fee *prosecutors* who vindicate purely sovereign interests fundamentally differ from contingency fee counsel who represent the government asserting a proprietary claim that a private plaintiff could bring. *See, e.g., City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1977). This is not such a claim. "A public nuisance abatement action must be prosecuted by a government entity and may not be initiated by a private party." Pet. App. 22a.

2. Not only did the court below trivialize petitioners' due process interests at stake, the court held that

the companies' size and wealth somehow gave them *less* due process rights. The court observed that the "[d]efendants are large corporations with access to abundant monetary and legal resources," and consequently the court believed that this case did not pose a threat of "the misuse of governmental resources against an outmatched individual." *Id.* at 23a-24a.

It is offensive to our Constitution to hold that due process rights decrease as the size and wealth of a person increases. "[T]he wealth of a defendant cannot justify . . . otherwise unconstitutional" procedures. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to [due process]."). Any reliance on petitioners' wealth to relax the due process standard was thus improper and exacerbated the due process violation.

3. The court also reasoned that this public nuisance action does not "prevent defendants from exercising any First Amendment right or any other liberty interest" or "result in an injunction that prevents the defendants from continuing their current business operations." Pet. App. 22a. Again, those factors are irrelevant to the due process inquiry whether fundamentally unfair procedures may deprive the companies of their fully protected property rights. In *Tumey*, the Court found a due process violation when the mayor-judge received $12 from a $100 fine imposed on a defendant. 273 U.S. at 532. The property interests here are substantially greater. The governments seek abatement of lead paint from all public and private buildings throughout California that could cost billions of dollars.

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW

A. The Validity Of Contingency Fee Arrangements In Sovereign Actions Is An Issue Of Recurring And Exceptional Importance

This case raises a recurring issue of far-reaching national importance involving the fairness of, and public confidence in, our civil justice system. Whether a civil prosecutor's pecuniary interest in a case violates due process has been a recurring issue in this Court. *See Marshall*, 446 U.S. 238; *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 620 n.12 (1993). In *Marshall*, however, the Court had no occasion to calibrate "with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," because the potential interest of the civil prosecutor in that case was "exceptionally remote." 446 U.S. at 250. In *Concrete Pipe*, the Court again declined to precisely define those limits because the issue was not properly presented. 508 U.S. at 620 n.12. More broadly, this Court's recent decisions reflect that cases involving the fundamental fairness and integrity of the judicial system merit plenary review. *See Caperton*, 129 S. Ct. at 2265-67.

This case presents a full and ideal context in which to consider the due process limitations on financially interested civil prosecutors. The case was conceived by contingency fee lawyers, sold as a risk-free opportunity for state and local governments, and has dragged on for a decade with little to show other than the imposition of substantial litigation costs and administrative burdens on the companies targeted by outside counsel.

The remedy sought in this case further illustrates the enormous potential for abuse, as the government entities seek abatement of lead paint from literally hundreds of thousands of buildings in California at a potential cost of billions of dollars, without regard to the public health consequences of that approach or the possible adverse effect of abatement on building owners. *See supra* pp. 16-17.

Review is particularly warranted here in light of the recent explosion of contingency fee arrangements with government entities. "[T]rial lawyers representing public clients on contingency fee are suing businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills." Martin Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, Research Roundtable, Northwestern Law School, at 7 (2008) (quoting Walter Olson, *Tort Travesty*, Center for Legal Policy (2007)). Such arrangements will become even more prevalent given that, at the behest of trial lawyer associations, federal statutes increasingly permit state attorneys general to enforce federal laws. *See* Victor Schwartz, *The Plaintiffs' Bar's Covert Effort to Expand the State Attorney General Federal Enforcement Power*, Legal Backgrounder, July 10, 2009, at 1.

In light of the increasingly prominent role of contingency fee lawyers in public prosecutions, this Court should clarify the due process limitations on such practices, which have confounded lower courts. The most notable example is the decision below. But the state high court in Rhode Island expressly noted the lack of clarity, while other courts have simply avoided the issue or invalidated similar agreements

on other grounds. *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 475 n.50 (R.I. 2008) (permitting agreements in limited circumstances, but noting that "[g]iven the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time"); *see also Commonwealth v. Janssen Pharm., Inc.*, 2 A.3d 474, 478 (Penn. 2010) (pharmaceutical company lacked statutory standing under state law to bring due process challenge to state's use of contingency fee lawyers in civil prosecution); *Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997) (state attorney general's retention of contingency fee lawyers violated state constitutional separation of powers).

B. The Court's Intervention Is Necessary To Preserve Fairness And Public Confidence In Judicial Proceedings

Beyond the need for clarity on these recurring issues, review also is warranted because the question presented is exceptionally important to maintaining the integrity of the judicial process. Over a dozen organizations condemned the contingency fee arrangements here in *amicus* briefs below. And they are not alone in viewing such arrangements as antithetical to fundamental fairness in judicial proceedings.

The Executive Branch in 2007 banned the federal government from paying lawyers a contingency fee. *See Protecting American Taxpayers from Payment of Contingency Fees*, Exec. Order No. 13,433, 72 Fed. Reg. 28441 (May 16, 2007). This prohibition reflects the "policy of the United States" that the fees of

lawyers representing the government should never be "contingent upon the outcome of litigation." *Id.*

Congress also has recognized that it is wholly inappropriate for a federal government lawyer to participate where he or she has a financial interest in the outcome of a case. Under federal law, any federal officer or employee with a nontrivial "financial interest" in an adjudicative proceeding is barred from "participat[ing] personally and substantially" on behalf of the government, including by "the rendering of advice." 18 U.S.C. § 208(a). The criminal and civil penalties for violating this restriction include up to five years imprisonment and fines of up to "$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater." *Id.* § 216(b). In addition, a few States limit the amount of contingency fees that government can pay to lawyers, and require transparency in the awarding of contingency fee government contracts. *See* Beisner et al., *supra*, at 9.

Former state attorneys general, too, have criticized the government's use of contingency fee lawyers. *See* Pryor, *supra*, at 4. And public prosecutors have recognized that these arrangements undermine the civil justice system. The California District Attorneys Association, which represents thousands of prosecutors throughout the state, explained in an *amicus* brief below that "[p]ermitting contingent fee attorneys to represent public law enforcement interests will necessarily and inevitably inject improper personal financial interests into the balancing process required in civil law enforcement cases and will undermine [public] confidence in the civil law enforcement justice system." Brief of Cal. Dist.

Attorneys Ass'n as Amicus Curiae Supporting Respondent, 2009 WL 1541982, at *3.

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"The function of the prosecutor . . . is not to tack as many skins of victims as possible to the wall [but rather] to vindicate the right of people as expressed in the laws." *Donnelly v. DeChristofo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting). Paying a prosecutor a bounty based on the amount of money he or she can extract from a defendant injects impermissible factors and incentives into the process that cannot be cured by providing nominal—and unrealistic—government staff lawyer supervision over the financially interested lawyers. That is evident here where the contingency fee prosecutors admittedly brought this case not to pursue the public interest, but to "bring the lead paint industry to its knees." *See supra* p. 2. This Court should grant review to restore the "appearance and reality," *Marshall*, 446 U.S. at 242, of fairness that is demanded by this Court's jurisprudence and is necessary to ensure the public's confidence in the civil justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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